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UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 SU BIN,

16 Defendant.

No. SA CR 14-131(C)-CAS

GOVERNMENT'S RESPONSE TO DEFENDANT
SU BIN'S POSITION WITH RESPECT TO
SENTENCING; DECLARATIONS OF JOHN
KORSTIAN, NICOLAS DESIMINI, AND
SPECIAL AGENT ROBERT I. KNUFF

Sentencing Date: July 13, 2016
Sentencing Time: 2:30 p.m.

17
18
19 Plaintiff United States of America, by and through its counsel
20 of record, the United States Attorney for the Central District of
21 California and Assistant United States Attorney Anthony J. Lewis,
22 hereby files the Government's Response To Defendant Su Bin's Position
23 with Respect to Sentencing, along with the accompanying declarations
24 of John Korstian, Nicolas DeSimini, and Robert I. Knuff.

25 The government's response is based upon the attached
26 declarations, the government's sentencing position and response to
27 the Pre-Sentence Investigation Report ("PSR") and the attached
28 declarations and exhibits, the files and records in this case,

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1 and (4) his arguments illustrate why Col. Myers's cost model is even
2 more conservative, not an overestimate as both defendant and Mr.
3 Sestak argue.

4 First, Mr. Sestak stated: "I have not examined the actual
5 documents," i.e., the technical orders. (Sestak Decl. ¶ 19.) Given
6 that Mr. Sestak spends considerable time claiming that the technical
7 orders are not complicated, his lack of foundation undermines his
8 conclusions and shows they are unsupported. Mr. Sestak, who has
9 never worked on the C-17, speculates from his experience on
10 commercial aircraft that technology is simply borrowed and technical
11 orders "cut-and-pasted" from one military aircraft to the next. (Id.
12 ¶¶ 7-8.) His speculation offers no basis to undermine the
13 calculations prepared by Col. Myers, who is the System Program
14 Director with broad responsibility over the C-17, including its
15 capabilities, operations, and finances, particularly where her cost
16 estimate is grounded on concrete numbers that appear in the actual
17 contracts and estimates used for sustaining the C-17. (Myers. Decl.
18 ¶¶ 5-6, 10-11, 22.)

19 Mr. Sestak also suggests, without having seen the technical
20 orders, that information about C-17 systems "can easily be found on
21 the internet." (Sestak Decl. ¶ 16.) That statement is not true if
22 it is meant to apply to the technical orders here or to all of the
23 information in them. The technical orders are caveated with a
24 Department of Defense distribution statement that prevents their
25 public disclosure. (Knuff Supp. Decl. ¶¶ 9-10.) One of the
26 technical orders, the file titled 1C-17A-1-2, has been determined to
27 be export-controlled and to contain technical data on the United
28 States Munitions List ("USML") subject to the International Traffic

1 in Arms Regulations and the Arms Export Control Act that cannot be
2 exported without a license. (Knuff Supp. Decl. ¶¶ 9-10.) It
3 therefore cannot be publicly posted on the Internet.

4 Second, Mr. Sestak makes repeated references to an hourly rate
5 of \$250, and to designations of the technical orders as simple,
6 moderate, or complex. (Id. ¶ 22.) These designations did not appear
7 in Col. Myers's declaration or her cost model. Rather, they only
8 appeared in materials provided in discovery while the final cost
9 model was being developed and three different models were being
10 prepared and evaluated.¹ (See id. ¶ 21.) Mr. Sestak's reference to
11 \$250 per hour of engineering labor is misplaced, because that was
12 used in one of the three models that was not used by Col. Myers; Col.
13 Myers used the lower figure of \$200 per engineering hour. (Myers.
14 Decl. ¶ 11.) Finally, defendant claims that the rate of \$200 per
15 hour is not specific. (PSR Obj. 5). Col. Myers, however, stated
16 that the additional expenses are "routinely" charged, but they would
17 not be accounted for without using the conservative estimate of \$200
18 per hour, and defendant offers no basis to question that fact.

19 Third, Mr. Sestak purports to revise Col. Myers's calculations,
20 but he provides little guide as to how he did so. His references to
21 "gradations," a "time-based, program maturity reduction in costs,"
22 "[a]djusting the sale of the costs to better match the scale of the
23 complexity," the "values previously derived in this document," and a
24 "program maturity" adjustment that applied in some unspecified way

25 ¹ The alternative cost model that differentiated the hourly
26 rate by complexity level was not used by the government in its
27 sentencing position; because its values were used by the defense, the
28 government notes that model yielded a loss amount of over \$3 million.
The government recommends the Court use the cost model submitted by
Col. Myers.

1 somehow generated the figures in Table 1 totaling \$742,177.50.
2 (Sestak Decl. ¶¶ 26-28.) Without the ability to check or fully
3 understand his calculations, his ultimate conclusion cannot be
4 credited, certainly not over Col. Myers's.

5 Fourth, defendant and Mr. Sestak argue that the most labor-
6 intensive work to create the technical orders would have been done
7 earlier in the life cycle of the C-17. (PSR Obj. at 5; Sestak Decl.
8 ¶¶ 6, 26, 28.) If this argument were credited, however, it would
9 simply show that Col. Myers's estimate was even more conservative
10 because it did not account for the more cost-intensive engineering
11 labor when the technical problems were first being solved and the
12 engineering staff faced steeper learning curves. Mr. Sestak explains
13 that he believes "the costs of all documents are gradually reduced
14 over time in these large programs" like the C-17 because of "the
15 general improvement in learning curve by all personnel as a program
16 matures," and that therefore Col. Myers's calculations are "greatly
17 inflate[d]." (Sestak Decl. ¶ 26.) Col. Myers, however, used an
18 hourly rate based on "the operative contract in 2010" with Boeing.
19 (Myers Decl. ¶ 11.) Therefore, following Mr. Sestak's reasoning, the
20 cost model submitted by Col. Myers used the average number of hours
21 needed to complete one page of a technical order (and the average
22 hourly rate) by personnel who were already familiar with the
23 technology later in the C-17 program. In other words, Col. Myers's
24 cost model does not even account for the "most labor-intensive work
25 [that] would have been done on these Technical Orders," showing why
26 it was a conservative cost model, not an over-estimate as defendant
27 claims. (PSR Obj. ¶ 6.) Col. Myers's calculations were based
28 Boeing's engineering labor rates for the C-17 in 2010, and her cost

1 model yielded a reasonable estimate of the cost to create the seven
2 technical orders.

3 Defendant claims that the government offers no reason why it
4 used the values from 2016 (PSR Obj. 5), but Col. Myers declaration
5 clearly states that the cost model's calculations could not be
6 completed precisely the same way for 2010 because the number of pages
7 of technical orders that were text versus illustration was no longer
8 known, and the model ascribed a different cost for producing a page
9 that was text versus a page that contained an illustration. (Myers
10 Decl. ¶ 25.) Even using the lowest possible value for 2010 (i.e., if
11 all the pages were text), which were calculated by Col. Myers, the
12 cost model still yields \$1,527,200--more than the \$1.5 million
13 threshold for a sixteen-level enhancement. (Id. ¶¶ 27-28.)

14 Defendant also claims that this loss amount cannot be used
15 because defendant did not intend for the loss amount to be this high.
16 (PSR Obj. 3.) Defendant cites United States v. Yihao Pu, 814 F.3d
17 818, 826 (7th Cir. 2016) for the proposition that defendant must have
18 intended to cause the loss amount associated with developing the
19 technology. (PSR Obj. 3.) Yihao Pu, however, is inapplicable,
20 because in that case "the parties agreed that there was no actual
21 loss," but "disputed the intended loss amount," so the court
22 naturally relied on evidence as to the amount of loss defendant
23 intended. Other cases have used the cost of development,
24 irrespective of defendant's intent to cause that amount. United
25 States v. Four Pillars Enter. Co., No. 06-3297, 253 Fed. Appx. 502,
26 2007 WL 3244034, at *1, *8-9 (6th Cir. 2007) (unpublished decision)
27 (affirming district court's use of victim witness's description of
28 research and development costs associated with adhesive formula);

1 United States v. Ameri, 412 F.3d 893, 900-01 (8th Cir. 2005)
2 (affirming trial court's loss amount of \$1.4 million, where employee
3 stole his employer's two copies of proprietary software whose
4 development cost was \$700,000, where software was at the heart of a
5 \$10 million contract, had no verifiable fair market value because it
6 was not available separately, and alternatively had a fair market
7 value of \$1 million per copy). There is no authority for limiting
8 the loss amount--particularly where the Guidelines provide for using
9 the cost of developing technology--to only that which defendant
10 intended.

11 Although defendant now claims that his valuation estimates for
12 C-17 files were based only on lists of files or topics without the
13 contents of those files (PSR Obj. 3), that claim is contradicted by
14 the evidence in the case, namely the document that he drafted and
15 sent to UC1 with those values, and with the many documents he
16 received, translated, and analyzed. For example, defendant
17 necessarily saw and then shopped some of the stolen files to experts
18 in order to tell UC1 that the files were unique and had never been
19 seen before. (Ex. 14 at 140.) While some work remained to be done
20 in collecting additional files according to defendant's direction,
21 defendant was not looking only at a mere shopping list or
22 "meaningless" lists with no substance, he had seen and analyzed some
23 of the raw materials that were stolen.

24 Defendant points to the fact that some types of documents that
25 defendant said had value did not appear in the two-page list that
26 followed in that same document on February 2, 2010. (PSR Obj. at 8-
27 9; Ex. 14.) Defendant's conclusion, however, was reached after he
28 had received multiple e-mails with multiple directory file listings

1 in the previous month, and was based on his review of many files and
2 directory file listings by that time. (Knuff Supp. Decl. ¶ 4.) To
3 take defendant's example, while there are no items listed in Exhibit
4 14 that explicitly referred to "testing," UC1 had sent defendant an
5 e-mail on January 21, 2010 attaching four directory listings inside
6 an archive titled C-17_2; one of them contained at least ten
7 filenames with references to "testing" and another contained at least
8 twenty-nine filenames with references to "testing." (Knuff Supp
9 Decl. ¶¶ 5.a-b.) Furthermore, in the 1,467-page directory file
10 listing that defendant sent to UC1 with highlighting, nineteen files
11 were highlighted with the word "testing," showing that defendant was
12 specifically directing UC1 to take documents related to testing from
13 materials he had already received. (Id. ¶ 6.)

14 Ultimately, even if one or more of defendant's or Mr. Sestak's
15 arguments were credited, a loss amount of \$1,875,020 using the
16 complete 2016 figures, or \$1,527,200 using 2010 figures, is
17 conservative, where they are based on only 7 technical orders. Seven
18 technical orders represent a tiny fraction of the 85,000 files UC1
19 claimed they stole related to the C-17 (Ex. 3 at 56) and did not
20 include the files defendant highlighted for UC1 to steal (CR 1 at
21 28). Further, the C-17 was only one of the aircraft and technologies
22 stolen by defendant with UC1 and UC2.

23 Defendant's own estimate of the value and the operating costs of
24 his co-conspirators corroborate this calculation of the loss amount
25 and offer alternative measurements that reach similar loss amounts,
26 as described in the government's sentencing position. Although
27 defendant claims the activities of the front companies and their
28 operations do not tie to defendant's participation in the offense

1 (PSR Obj. at 10), as noted in the government's sentencing position,
2 multiple projects referenced in their reports were projects that
3 defendant personally assisted in compromising or evaluating. (CR 75
4 at 5-6.)

5 **B. Defendant Stole Trade Secrets for a Foreign Government,
6 Foreign Instrumentality, and Foreign Agents**

7 Defendant argues that this enhancement must be proven by
8 reasonable certainty, rather than by a preponderance of the evidence.
9 Defendant's argument illustrates why there are two separate bases on
10 which this enhancement applies, and the government has met the
11 standard under each. Because defendant completed the acts sufficing
12 to prove the theft of trade secrets knowingly benefiting foreign
13 government, instrumentality, and agents, a preponderance of the
14 evidence suffices, and the evidence easily meets that standard. In
15 instances where offense characteristics are based only on the intent
16 of the conspirators, rather than on completed acts, a reasonable
17 certainty is called for. Here, the evidence also shows by a
18 reasonable certainty that defendant intended to steal trade secrets
19 for those same beneficiaries.

20 Section 2X1.1(a) provides that the base offense level for a
21 conspiracy is that for the substantive offense, "plus any adjustments
22 from such guideline for any intended offense conduct that can be
23 established with reasonable certainty." (emphasis added.) United
24 States v. Nadirashvili, 655 F.3d 114, 122 (2d Cir. 2011), cited by
25 the defense, required the use of a reasonable certainty standard,
26 because the enhancement applied only to intended conduct, rather than
27 completed conduct. (PSR Obj. 13); U.S.S.G. § 2X1.1 App. Note 2
28 (calling for application of reasonable certainty standard when an

1 arrest for a conspiracy occurred "during the conspiratorial stage of
2 planning" "because such factors would be speculative" except where a
3 reasonable certainty "established that the defendants actually
4 intended to physically restrain the teller"). Conversely, in United
5 States v. Cabrera, 288 F.3d 163, 169-70 (5th Cir. 2002), the Fifth
6 Circuit observed exactly this distinction: "We conclude that the
7 government is correct that subsection 2X1.1(a)'s reasonable-certainty
8 standard is specific to findings of intended conduct," rather than
9 conduct that actually did occur, for which a preponderance of the
10 evidence standard applies.

11 Here, defendant has already admitted to exchanging e-mails
12 showing that C-17 files had been stolen, that the Project A materials
13 had been stolen, and that the F-22 and F-35 documents discussed below
14 had been stolen, which facts are also detailed in the PSR. (Plea
15 Agmt. ¶¶ 12.k.8-14; PSR ¶¶ 42-55.) He also intended to steal what
16 were trade secrets. (CR 75 11-13.) Under either standard, the
17 evidence supports the four-level enhancement.

18 1. Defendant Stole Trade Secrets

19 After the PSR was disclosed on June 6, 2016 (CR 69), on July 6,
20 2016 defendant objected to its conclusion that what he stole were
21 trade secrets because--he claims--they did not have value by virtue
22 of their being secret. As set forth below, and in the government's
23 sentencing position (CR 73, 75), defendant sought trade secrets as an
24 object of his conspiracy with UC1 and UC2, and defendant and UC1
25 stole what in fact were trade secrets.

26 The factual elements of a trade secret are: "(1) that the
27 information is actually secret because it is neither known to, nor
28 readily ascertainable by, the public; (2) that the owner took

1 reasonable measures to maintain that secrecy; and (3) that
2 independent economic value derived from that secrecy." United States
3 v. Chung, 659 F.3d 815, 825 (9th Cir. 2011).

4 Trade secrets can take many forms, can relate to different types
5 of technology or internal processes, and can relate to various stages
6 of the development, production, or competitive aspects of that
7 technology or of business operations. E.g., United States v. Lange,
8 312 F.3d 263, 266 (7th Cir. 2002) (CAD drawings of airplane brake
9 assemblies); Chung, 659 F.3d at 825 (documents related to a rocket
10 and to a phased array antenna for the space shuttle); United States
11 v. Krumrei, 258 F.3d 535, 536 (6th Cir. 2001) (information related to
12 process for applying coatings); United States v. Hsu, 155 F.3d 189,
13 195-96 (3d Cir. 1998) (processes, methods, and formulas for
14 manufacturing an anti-cancer drug).

15 Last week the Ninth Circuit re-affirmed that the types of
16 information that can constitute trade secrets are broad, and that
17 they include "financial and business information" or customer lists,
18 and that a trade secret "may consist of a compilation of data, public
19 sources or a combination of proprietary and public sources." United
20 States v. Nosal, __ F.3d __, Nos. 14-10037 & 14-10275, slip op. at
21 32-35 (9th Cir. July 5, 2016). Even if defendant's claim that some
22 portion of the information contained in the materials defendant stole
23 were in the public domain (PSR Obj. 3)--a claim that is not supported
24 by any evidence submitted by defendant--Nosal plainly states that
25 trade secrets can be an "amalgam of public and proprietary source
26 data." Id. at 34.

27 The government is now submitting two declarations that establish
28 that two of the files defendant stole with UC1 were trade secrets,

1 which evidence is in addition to defendant's explanation to his co-
2 conspirators of the value, to his seeking and translating proprietary
3 information, and to his description to his co-conspirators of the
4 importance of design-phase information detailed in the government's
5 sentencing position (CR 75 at 11-13; e.g., Ex. 14 at 140). The
6 testimony of John Korstian and Nicolas DeSimini was previously
7 proffered in extradition submissions, which were produced in
8 discovery and underlie the PSR's conclusions in paragraphs 50 and 55,
9 and is now submitted in declarations to the Court.

10 Mr. Korstian's declaration refers to the F-35 Flight Test Plan,
11 which was incorporated into the document that defendant translated
12 into Chinese and e-mailed to UC1 on May 3, 2012, the first page of
13 which appears on page 47 of the complaint affidavit. (CR 1 at 45-
14 47.) The F-35 Flight Test Plan was used to outline how the F-35
15 would be tested as it was developed, including: how many airplanes
16 would be built and used; how certain components would be tested, how
17 they could be configured, and using what instrumentation; and the
18 techniques used to test the performance, capabilities, and limits of
19 various features of the F-35. (Korstian Decl. ¶ 5.) His declaration
20 describes how the F-35 Flight Test Plan included various parameters
21 used in flight tests for the F-35, how those details are not publicly
22 available, and the measures used to protect that information,
23 including physical and electronic access and agreements with
24 employees and partner defense contractors. (Id. ¶¶ 4-5.)²

25
26 ² As noted in the complaint affidavit, exactly which company's
27 computer systems were compromised is not known for every file that
28 was stolen, in particular where numerous companies worked jointly on
projects and where prime contractors sub-contracted portions of the
projects to other companies. (CR 1 at 18.)

1 Mr. Korstian explained that the details reflected in the F-35
2 Flight Test Plan were valuable because they were not public,
3 including the details listed above, in part because the decisions
4 regarding the details included in it were the result of the judgment
5 and expertise of engineers at Lockheed Martin Aeronautics Company
6 ("LM Aero"). (Id. ¶¶ 5, 5.a.) Those details include: how many
7 flights, flight hours, ground test hours would be used; the timeline
8 for executing the flight test plan; the number of sites used to
9 perform the testing; the process for how data was transmitted,
10 stored, and processed; and the list of all of the tests of various
11 components that would be performed. (Id. ¶ 5.b.) Those details all
12 require decisions about cost, timing, staffing, validation processes,
13 and resources, which are all elements used when competing for
14 government contracts. (Id. 5.c.)

15 The F-35 Flight Test Plan also reflected how LM Aero and its
16 partners approached the overall design of a testing plan, and the way
17 in which the F-35 Flight Test Plan sought to carry out its flight
18 testing plan is not public. (Id. ¶ 5.d.) Aside from the individual
19 numerical values or design parameters, the fundamental approaches to
20 design and problem-solving can constitute trade secrets--and are
21 precisely the type of information that a defense contractor can
22 "derive[] some economic value from keeping . . . secret" because they
23 can have an "implication for everything else [a defense contractor]
24 is working on" and "show a competitor how [a defense contractor]
25 operates." Chung, 659 F.3d at 827 ("A reasonable inference is that
26 the information could assist a competitor in understanding how Boeing
27 accomplishes its work, including engineering and processing, and
28 would reveal Boeing's relative costs for performing each type of

1 work. A reasonable inference is that the information could assist a
2 competitor in understanding how Boeing approaches problem-solving.”).

3 Mr. Korstian also explained that proprietary information
4 agreements were in place that protected proprietary information
5 whenever it was shared with partner defense contractors. (Korstian
6 Decl. ¶ 4). That measure has been relied upon by the Ninth Circuit
7 to reinforce findings that a trade secret has been afforded
8 appropriate, reasonable protection measures. Nosal, slip op. at 36
9 (ruling that sharing of trade secret with third parties did not
10 undermine trade-secret status because when it was shared, “it was
11 provided on an understanding of confidentiality”).

12 There is no doubt that this document, one that required nearly
13 60,000 hours of time by skilled employees at a sophisticated defense
14 contractor to help create one of the world’s most advanced fighter
15 jets, is a trade secret. (Korstian Decl. ¶ 3.)

16 Mr. DeSimini’s declaration refers to the presentation for the F-
17 22 AVEL that UCI took pictures of and sent to defendant on April 4,
18 2010. (CR 1 at 41-43.) The AVEL is the AMRAAM Vertical Eject
19 Launcher, and an AMRAAM is the Advanced Medium Range Air-to-Air
20 Missile on the F-22; it is used to eject missiles from within the
21 plane, rather than carrying weapons externally, which allows the F-22
22 to be more stealthy. (DeSimini Decl. ¶ 3.) His declaration
23 describes how the training presentation incorporated details about
24 the engineering used to develop and produce the AVEL, how those
25 details are not publicly available, and the measures used to protect
26 that information, including physical and electronic access and legal
27 agreements. (Id. ¶¶ 5-6.) He furthermore explained that the details
28 in the presentation (including diagrams, renderings, annotations,

1 photographs, schematics, quantitative metrics, instructions, and
2 descriptions of certain functions) are valuable because they are not
3 public, specifically because they would allow competitors to reverse-
4 engineer much of the engineering work that went into creating it.
5 (Id. ¶¶ 7, 7.a-b).

6 While any one trade secret that was in fact stolen, established
7 by a preponderance of the evidence, suffices to apply the
8 enhancement, these two declarations show that defendant stole at
9 least two different trade secrets that related to two different
10 companies.

11 The government previously set forth all the facts showing not
12 only that defendant successfully obtained, but that he was
13 specifically seeking trade secrets, in pages 11-13 of the
14 government's sentencing position, which are not repeated here. (See
15 CR 73 11-13). In light of Nosal, it should be emphasized that
16 defendant used his own words to describe the competitive advantages
17 that the attributes of one aircraft have over others (Ex. 14 at 140),
18 that he was trained himself in aviation and aerospace (Plea Agmt. ¶
19 12.a), and that he confirmed no one in the industry had seen
20 documents they stole and that their unique nature made them valuable
21 (Ex. 14 at 140; Ex. 10 at 91 (referring to the materials "fondly
22 dreamed of" and their "first time having contact with secret data
23 related to the US military's" Project A), which are examples of the
24 evidence that shows with more than reasonable certainty that
25 defendant was specifically seeking trade secrets. Nosal, slip op. at
26 37 (relying on defendant's status as a former executive to show he
27 was "familiar with the competitive advantage" conferred by the
28 customer list trade secrets).

1 2. Defendant Knew and Intended the Trade Secrets Would
2 Benefit 2PLA, QTC, and Military Officers UC1 and UC2

3 Defendant's attempts to dodge or ignore his explicit references
4 to 2PLA and QTC, that two military officers were his co-conspirators,
5 and the military nature of the subject matter of the conspiracy that
6 defendant described in his own words, are each unpersuasive.

7 First, defendant suggests there are only two versions of the
8 Project A report, but defendant e-mailed three different versions of
9 that report. (PSR Obj. 16-17.) The second one--that the metadata
10 shows defendant last modified--was the first to refer to 2PLA and
11 QTC,³ but those references stayed in the third and longest report
12 that defendant sent (and which defendant also edited). (Knuff Init.
13 Decl. ¶¶ 5.g.i-iii, 5.h; Knuff Supp. Decl. ¶ 3.) The metadata
14 included in Exhibit 10 is that of the third and longest report
15 defendant prepared. (Id.)

16 Second, the metadata shows defendant is the one who edited the
17 document. (Ex. 10 at 103.) Defendant's response to the PSR suggests
18 that defendant only "open[ed]" the document rather than "edited" it,
19 but defendant already admitted in the plea agreement that he "edited"
20 it. (Plea Agmt. ¶ 12.k.11.)

21 Third, moreover, the metadata that defendant points to--the
22 "Total editing time"--does not show that defendant only spent one

23 ³ Defendant tries to distinguish the formal name of QTC in the
24 government's sentencing position from what claims he was referring
25 to, "Qingan Group Co., Ltd." (PSR Obj. 16.) The distinction is
26 immaterial, because defendant refers to it as "your department,"
27 referring to 2PLA, showing that defendant knew it was subordinate to
28 the Chinese military. (Ex. 10 at 91.) Similarly, while defendant
notes that the document was signed on behalf of a different entity,
it is immaterial if defendant was ghostwriting it or not. (PSR Obj.
17.) The evidence shows that defendant was the person writing and
revising the document.

1 second editing it, rather it more likely shows defendant took the
2 step of saving each version as a new document. Furthermore, this
3 "Total editing time" field resets when a document is saved as a new
4 document (the "Save As" function in Microsoft Word that allows a user
5 to save the document as a new file with a new filename), and each of
6 the versions of the report that defendant e-mailed had a new
7 filename. (Knuff. Supp. Decl. ¶¶ 2-3.)

8 Fourth, the very subject matter and language defendant used show
9 that he knew this information was not merely for a commercial
10 enterprise. (E.g., Ex. 10 at 91 (noting the information "showed us
11 perfectly the US military's navy, air force, and army's complete
12 coordinated combat thinking"); id. at 94 (explaining that this "set
13 of materials is the highest-level classification we have seen of all
14 the US military materials, and it is extremely valuable"); id. at 102
15 (noting the stolen information "has extremely vital significance in
16 our country's speeding up the development" of Project A).) Defendant
17 knew more was at stake than his own technical curiosity, and knew--
18 from the subject matter alone, let alone the explicit references to
19 2PLA and QTC--that something other than private aviation industry was
20 involved. (Deft. Posn. 16.)

21 Ultimately, the fact that defendant edited the reports, that
22 they were about Project A, that defendant used explicit language
23 about their military nature, that he sent them to his two co-
24 conspirators who were military officers, and that defendant--in his
25 editing--first included the references to 2PLA and QTC and then
26 preserved them in the final version he e-mailed shows that defendant
27 knew he was stealing data for the Chinese military and its agents and
28 instrumentalities.

1 **C. Defendant's Role Was Essential to the Scheme, Not Minor**

2 As summarized in the government's sentencing position, defendant
3 told UC1 and UC2 whom to target, which files to steal, why they were
4 important, and then translated and analyzed what they stole. These
5 facts show that defendant understood the scope and structure of the
6 criminal activity, and that he participated in planning for the
7 activity and exercised decision-making authority by figuring out whom
8 to target and then selecting which files he instructed UC1 to steal.
9 U.S.S.G. § 3B1.2 App. Note 3(C) (i)-(iii). His participation also
10 involved reviewing both lists of files to determine which should be
11 stolen, and reviewing the contents of files to determine their
12 significance, tasks which the evidence shows were left to defendant
13 alone. Id. § 3B1.2 App. Note 3(C) (iv). And while defendant claimed
14 he did not in fact receive financial proceeds from the scheme, he has
15 admitted and maintains that he entered into the scheme for purposes
16 of commercial advantage and for profit. Id. § 3B1.2 App. Note
17 3(C) (v); (Plea Agrt. ¶¶ 12.h).

18 Defendant was trusted with the most sensitive details of the
19 scheme. UC1 sent him both the raw lists of files to which he had
20 gained access inside companies in the United States in order to seek
21 defendant's direction in choosing which to steal, and UC1 sent
22 defendant original files that UC1 had stolen for defendant to
23 evaluate. E.g., Plea Agrt. ¶ 12.k(3), (9)-(10), PSR ¶ 50; CR 1 at
24 37-43.

25 Defendant claims that UC1 and UC2 could have carried out the
26 offense without him. (Deft. Posn. 17). The fact that others could
27 have carried out the offense if defendant had not chosen to join the
28 conspiracy and participate in it is not a basis to award a downward

1 adjustment, but more importantly that claim is not supported. UC1
2 was able to hack into a given target while defendant may not have
3 been; but UC1 relied on defendant to identify whom to target, he
4 relied on defendant to select which files to steal, and he relied on
5 defendant to determine the significance of what they stole. In
6 essence, UC1 treated defendant as the subject matter expert that he
7 was. For example, narrowing a list nearly 1,500-pages long down to
8 146 documents or folders for UC1 to steal allowed the conspiracy to
9 operate effectively, without spending UC1's time downloading and
10 examining files that were not needed, or gaining access to companies
11 whose technology was not needed. (Knuff Supp. Decl. ¶ 6.)

12 Defendant tries to brush aside the 146 e-mails that he exchanged
13 with UC1 and UC2, suggesting that they largely involved directory
14 file listings (lists of files and folders) and were lost in the flow
15 of other e-mails he received. (PSR Obj. 12.) These e-mails,
16 however, reflect considerable time and effort on defendant's part.
17 Defendant spent the time to review a 1,467-page list of files and
18 folders and highlighted 146 of them (Knuff. Supp. Decl. ¶ 6); he
19 spent the time to translate a technical flight test plan in English
20 into Chinese (Knuff Supp. Decl. ¶ 7; Korstian Decl. ¶ 7); he edited
21 multiple versions of a report discussing the significance of Project
22 A (Knuff Init. Decl. ¶ 5.g-h.); and he took the time to show stolen
23 C-17 files to experts in China (Ex. 14 at 140). Inasmuch as
24 defendant may not have been able to hack into U.S. companies himself,
25 UC1 would not have known whom to target, what to steal, or how to
26 explain its significance to anyone without defendant.

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1 Defendant has made no showing that satisfies his burden of
2 proving he was entitled to a minor role. United States v. Rodriguez-
3 Castro, 641 F.3d 1189, 1193 (9th Cir. 2011).

4 **III. DEFENDANT IS NOT ENTITLED TO A VARIANCE NOR TO A SENTENCE OF**
5 **THIRTY MONTHS**

6 Defendant advances a number of arguments in support of his
7 request for a variance and in support of his contention that a
8 sentence of thirty months is appropriate. Those arguments do not
9 account for the significance of the information defendant stole with
10 UC1 and UC2, the range of different projects defendant assisted in
11 targeting, stealing, and analyzing, and the fact that the information
12 at issue relates to military weapons systems used in national
13 defense.

14 Defendant points to other "fraud" cases that have resulted in
15 similar but slightly lower sentences. (Deft. Posn. 20, 23.)
16 Defendant stole export-controlled military technology that also
17 included trade secrets relating to the design of multiple military
18 aircraft and other technologies, and his attempt to sweep it into the
19 mean or median sentences for generic "fraud" cases is unpersuasive.
20 (Id.) While defendant's conviction shares a common Guideline with
21 other fraud offenses, defendant stole trade secrets and sensitive
22 data on the USML from military aircraft and technologies, and those
23 facts set this case far apart from average fraud sentence.
24 Similarly, while willfully exporting any defense item on the USML is
25 a serious crime, defendant's attempt to compare a single judgment in
26 another district involving multiple rifle scopes is not an apt
27 comparison of the design materials used to make military airlifts,
28

1 fighter jets, or Project A, all of which are of strategic
2 significance. (Id. at 3, 20, 24.)⁴

3 Defendant and his spouse own a home in Canada, at least two
4 apartments in Beijing, an apartment in Shanghai, and an apartment in
5 Guangzhou. (PSR ¶¶ 132.b-d.) These values do not account for
6 whatever the balances are in defendant's savings accounts in China
7 and Canada, which are not included in the PSR. (PSR ¶ 132.a.)
8 Defendant has the ability to pay a fine of \$100,000, which is far
9 less than the loss amount discussed above.

10 Defendant points to his family, friends, and employees who have
11 submitted letters about their view of his redeeming qualities, which
12 are appropriate for the Court to consider as a part of defendant's
13 history and characteristics. (Deft. Posn. 3-15.) These facts are
14 more than accounted for in the low-end sentencing recommendation,
15 given the aggravating factors that take this case out of the category
16 of a typical "fraud" case that would be governed by the same
17 Guideline. More relevant to his offense conduct, however, is that
18 defendant did business with U.S. companies and traveled in and out of
19 the United States for years, while he channeled sensitive
20 technologies of other aviation and defense companies to military
21 officers and front companies in China.

22 Defendant claims that his wife will be relying on him and
23 drawing down their savings until he is released from prison. (Deft.
24 Posn. 25.) The Guidelines provide that "family ties and
25 responsibilities are not ordinarily relevant in determining whether a

26 ⁴ Defendant refers to national statistics on offenses under §
27 2M5.1, but § 2M5.2 applies here, and the figures in the document
28 defendant cite show that a larger fraction of the cases resulted in a
within-guidelines sentence. (Deft. Posn. 23 n.3.)

1 departure may be warranted." U.S.S.G. § 5H1.6. While defendant
2 points to his age as a reason why he will not recidivate, that
3 conclusion--even if statistically true--is hard to evaluate when he
4 states he will be returning to China with his family. (Deft. Posn.
5 26.)

6 Defendant also notes that he decided to waive extradition, plead
7 guilty, and therefore avoided additional litigation in Canada and the
8 United States. (Deft. Posn. 3, 27.) In evaluating defendant's
9 request for a variance or to a sentence of thirty months on this
10 basis, the Court should also consider that the government agreed not
11 to proceed on additional charges of violations of the Arms Export
12 Control Act, theft of trade secrets, or additional violations of
13 unauthorized computer intrusions, all of which had been charged.
14 (Plea Agrt. ¶ 3.d.) Defendant's conduct alone shows that he is not
15 entitled to a variance based on his acceptance of responsibility,
16 which is already accounted for in the Guidelines range. U.S.S.G. §
17 3E1.1; (Plea Agrt. ¶ 3.e).

18 While defendant repeats that he did not earn any money as a
19 result of the scheme (Deft. Mot. at 2, 16), he admitted both that he
20 engaged in the six-year conspiracy for purposes of commercial gain
21 and sought to profit from the data he and UC1 stole. (Plea Agrt. ¶
22 12.h.) Given he ascribed specific monetary values to categories of
23 data he identified for UC1, even if he were unsuccessful in profiting
24 from the stolen data, he was successful in stealing it and lauding
25 its significance.

26 **IV. CONCLUSION**

27 For the foregoing reasons, the government respectfully submits
28 that an appropriate sentence for defendant is fifty-seven months'

1 imprisonment, one year of supervised release with the terms
2 recommended by the USPO, a fine of \$100,000, and a \$100 mandatory
3 special assessment.

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1 Aero by means of restricting electronic access to F-35 technical data
2 through users' credentials, by means of restricting physical access to
3 LM Aero's physical facilities where such information was stored or
4 accessible, and through legal agreements with all LM Aero employees
5 who were authorized to access F-35 data that they keep such
6 information confidential. LM Aero also had (and has) in place
7 proprietary information agreements with its partner defense
8 contractors on F-35 that protect proprietary information and limits
9 its use and dissemination.

10 5. Lockheed Martin and its partner F-35 defense contractors
11 used a specific approach to the design, testing, and development of
12 the F-35, which included various parameters and details that were
13 proprietary, such as: the number of airplanes that would be built and
14 used for testing; the scope of the testing for various components of
15 the F-35; the instrumentation that would be used to test and operate
16 the F-35; the avionics configuration; and the techniques used to test
17 the performance, capabilities, and limits of various features of the
18 F-35. This information was contained in the F-35 Flight Test Plan and
19 is not publicly available.

20 6. I also know--as a former engineer, principal, and manager at
21 LM Aero -- that the information contained in the F-35 Flight Test Plan
22 includes information that is valuable because it is not public.

23 a. Deciding how many planes to build, which
24 instrumentation to use, how to scope the testing of different
25 components, and exactly which techniques would be used to test the
26 aircraft and its components are the product of the judgment and
27 expertise of engineers at LM Aero.

28 b. The F-35 Flight Test Plan includes the number of
aircraft, how many test flights would occur, how many flight hours
would be involved, and how many ground test hours would be involved.

1 It also includes a schedule showing how long each phase of the flight
2 testing will last, the number of sites that will be used to test the
3 F-35, the process for seeking and obtaining flight clearance approvals
4 in order to conduct flight tests, the process for how data is
5 transmitted, stored, and processed from the testing, and the list of
6 all of the tests of various components that would be performed.

7 c. Each of these details involve decisions regarding cost,
8 timing, staffing, validation processes, and resources. These elements
9 are evaluated or accounted for when the government selects which
10 company will be awarded government contracts, and the decisions made
11 and the parameters used--that are reflected in the F-35 Flight Test
12 Plan--rely on LM Aero and its partners' experience and designing and
13 producing fighter jets.

14 d. The F-35 Flight Test Document also reflects how it is
15 that LM Aero and its partners approach the overall design of a testing
16 plan. Although every project has its own individual requirements, the
17 approach outlined in anticipating how this or other flight test plans
18 would be accomplished by LM Aero and its partners is not public.

19 7. I have also reviewed a document shown to me by Special
20 Agents of the FBI (the "Chinese Flight Test Plan") that appeared to
21 contain the same text in English as the F-35 Flight Test Plan, but
22 which contained numerous differences from the F-35 Flight Test Plan.
23 For example, multiple images were included in the Chinese Flight Test
24 Plan that did not appear in the F-35 Flight Test Plan. I recognized
25 two such images related to a "catbird," or "Cooperative Avionics
26 Testbed," that was a modified Boeing 737 aircraft used to test F-35
27 avionics in flight; neither the aircraft nor those images existed in
28 August 2001 when the F-35 Flight Test Plan had been finalized. There
were also differences in the cover page on the two documents.

Although each document stated it was the proprietary information of

1 Lockheed Martin and its partner defense contractors, the Chinese
2 Flight Test Plan contained an export certification number on the cover
3 page that was different from the export certification number on the
4 original document. Also, the team logo on the Chinese Flight Test
5 Plan was different from the logo in use by the program at the time the
6 original document was developed. There were several other formatting
7 changes between the two documents.

8 I declare under penalty of perjury under the laws of the United
9 States of America that the foregoing is true and correct and that this
10 declaration is executed in FORT WORTH,
11 TEXAS, on July 8, 2016.

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13 _____
14 JOHN KORSTIAN
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1 5. I developed the content of the EDO AVEL Presentation,
2 including the images, figures, diagrams, schematics, and the
3 technical specifications and parameters. In order to create the
4 presentation, I incorporated much of the engineering and technical
5 details that were used to develop and produce the AVEL. I also
6 routed the document through various personnel at EDO who attached the
7 markings that appear on the presentation, including specifically the
8 labels indicating it was "EDO Proprietary Information," "Source
9 Selection Sensitive," and "This Data is Covered by IATR [sic] 22 CFR
10 120-130," or alternative phrasings of those warnings.

11 6. The engineering and technical details used to develop and
12 produce the AVEL that were included in the EDO AVEL Presentation are
13 not publicly available. F-22 AVEL technical information in general
14 is not publicly available. It is protected by means of restricting
15 electronic access to F-22 AVEL technical data, by means of
16 restricting physical access to Harris or its predecessors' physical
17 facilities where such information was stored or accessible, and
18 through legal requirements placed on all employees who were
19 authorized to access F-22 data that they keep such information
20 confidential--I, like other employees of EDO and its successors,
21 signed a non-disclosure agreement.

22 7. From my work as an engineer, I know that the engineering
23 details contained in the EDO AVEL Presentation are valuable because
24 they are not publicly available.

25 a. The details in the EDO AVEL Presentation included:
26 detailed, annotated, three-dimensional renderings; photographs of the
27 AVEL and of its components; a cross-section diagram; mechanical
28 design schematics, hydraulic/pneumatic schematics, electrical

1 schematics, and other annotated schematics; descriptions of the
2 functions of different parts of the AVEL; certain quantitative
3 metrics of the performance and tolerance of components of the AVEL;
4 and instructions for the installation and removal of the AVEL.

5 b. The details included in the EDO AVEL Presentation are
6 the result of the engineering that was used to create this advanced
7 component in a state-of-the art fighter jet. Through an examination
8 of the illustrations and written descriptions, a person would be able
9 to reverse-engineer much of the work that went into creating the AVEL
10 in the first place.

11 I declare under penalty of perjury under the laws of the United
12 States of America that the foregoing is true and correct and that
13 this declaration is executed in North Amityville, New York on July
14 11, 2016.

15 

16 _____
NICOLAS DESIMINI

1 <http://www.njd.uscourts.gov/sites/njd/files/EditMetaDataGuidePublic.pdf>
2 (last visited July 11, 2016); http://answers.microsoft.com/en-us/office/forum/office_2010-word/matching-created-and-last-modified-times-but-75/07927e13-4c54-4a2e-bf61-ac607aa8c3a0
3 (last visited July 11, 2016). When I have tested this on a computer by opening a
4 Microsoft Word document editing it for some period of time, and then
5 using "Save As" to save the file as a new document with a new name,
6 the metadata for that new document reflects "Total editing time" of
7 00:00:00. This is only one of the ways that this metadata can be
8 altered so that it does not reflect an accurate measurement of time
9 spent editing a document. Based on my training and experience, and
10 on my own testing of this feature, the "Total editing time" field
11 will not increment or change when a document is only opened; rather,
12 something in the document must change from the previous version for
13 the "Total editing time" field to change.

14
15
16 4. Before defendant sent the e-mail attached as Exhibit 14 to
17 my Initial Declaration on February 2, 2010, defendant had received
18 from UC1 a total of thirteen e-mails from UC1 attaching a total of
19 eight directory file listings related to the C-17.

20 5. On or about January 21, 2010, UC1, using email account
21 sent an email to defendant with an archive attachment C-17_2.rar.
22 Inside this archive file were at least four (4) .txt files which
23 appear to be directory file listings of various servers.

24 a. One of these directory file listings inside C-
25 17_2.rar was named "2.txt" and was approximately 321 pages long. In
26 that list of files were at least ten (10) files with references to
27 "testing" in their names, such as "100204 Inspection - Testing
28 Results.ppt" and "LRU Testing Summary 2008.pdf."

1 b. Another directory file listing inside C-17_2.rar was
2 named "3.txt" and was approximately 1,381 pages long. In that list
3 of files were at least twenty-nine (29) files with references to
4 "testing" in their names, such as "compatibility testing.doc" and
5 "ERCC Thermal Testing."

6 6. As noted on page 27 of the complaint affidavit filed in
7 this matter, on January 26, 2010, defendant sent UC1 a 1,467-page
8 Microsoft Word document containing a directory file listing. In it,
9 defendant highlighted in yellow a total of 146 files or folders,
10 including at least nineteen (19) files with references to "test" or
11 testing in their names, for example, "Compatibility Test Report
12 .pdf" and "C-17 LOAD TESTINGRev.A.xls." This e-mail was sent after
13 UC1 sent defendant an e-mail on January 21, 2010 asking for a
14 document explaining which files were important, which ones were not
15 important, and what the files were.

16 7. On or about July 9, 2014, the FBI made available to John
17 Korstian, then an engineer at Lockheed Martin Aeronautics Company, a
18 document written in English and interspersed with Chinese discussing
19 the flight test plan of the F-35 fighter jet. The first page of
20 this document is depicted on page 47 of the complaint affidavit
21 filed in this matter. I obtained that document from an e-mail that
22 defendant sent to UC1 on May 3, 2012.

23 8. On or about July 17, 2014, the FBI made available to Nick
24 DeSimini, an Engineering Fellow at what was then Exelis (since
25 acquired by Harris Corporation) five images of what appeared to be a
26 presentation about an F-22 component (the AVEL). Those images
27 stated they belonged to EDO. One of these images is shown redacted
28 on page 43 of the complaint affidavit filed in this matter. I

1 obtained those images from e-mails that UC1 sent to defendant on
2 April 4, 2010.

3 9. On or about December 2, 2014, the FBI received a
4 memorandum from the United States Department of State, Bureau of
5 Political-Military Affairs Office, Office of Defense Trade Controls
6 Compliance confirming that the Supplemental Flight Manual Mission
7 Computer USAF TO 1C-17A-1-2 contains technical data covered by
8 Category VIII(i) on the United States Munitions List.

9 10. Many of the Technical Orders ("TOs") related to the C-17
10 that I have reviewed in connection with this investigation contain a
11 warning referring to Distribution Statement D, which states:
12 "Distribution authorized to the Department of Defense and U.S. DoD
13 contractors only for administrative and operational use, 16 November
14 1987. Other requests shall be referred to WR-ALC/564 ACSS-TOMA,
15 Robins AFB, GA 31098-1607." I have been informed by personnel at
16 Robins Air Force Base ("AFB") that this statement limits the
17 disclosure of these technical orders, and any limited disclosure to
18 other third parties would be coordinated through Robins AFB and
19 would prevent them from being publicly available on the Internet.

20 I declare under penalty of perjury under the laws of the United
21 States of America that the foregoing is true and correct to the best
22 of my knowledge and belief. This declaration is executed at Los
23 Angeles, California, on July 11, 2016.

24 
25 _____
26 ROBERT I. KNUFF
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